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No. 06-728

In the

Supreme Court of the United States

JACK MURPHY, individually and as a member of AK Capital LLC, suing on behalf of himself and all other members of AK Capital LLC similarly situated and in the right of AK Capital LLC,

Petitioner,

v.

KOREA ASSET MANAGEMENT CORPORATION,

Respondent,

AK CAPITAL LLC,

Defendant.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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Certiorari Should be Granted Because this Case, Taken in Tandem with the Pending Petition in *Powerex*, Perfectly Frames the Issues that Currently Divide the Circuits and Adds the Critical Component of Private Ownership

The question presented by this Petition, and that of the pending *Powerex* Petition,[1] which the *Solicitor General has strongly recommended that the Court grant*, are closely allied. Both questions address, from different perspectives, what should be the appropriate test for deciding whether a foreign company is an "organ" of its government, thus entitling it to immunity under the Foreign Sovereign Immunities Act.

Using one application of the FSIA's "organ of a foreign state" provision, the *Ninth Circuit*, in *Powerex*, held that a Canadian company, which is *wholly*, albeit indirectly, owned by *Her Majesty the Queen* in "right of" the Province of British Columbia, is *not* immune from suit under the *Foreign Sovereign* Immunities Act. However, using a different application, the *Second Circuit*, in our case, determined that a Korean company, which has more than 30% of its stock owned by *private banks*, and is in large part controlled by private interests, *is* immune from suit under the very same act.[2] Thus, by

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[1] *Powerex Corp. v. Reliant Energy Service, Inc.*, No. 05-85.

[2] For example, as detailed in our opening brief, the Ninth Circuit disregarded substantial evidence that the defendant "serves a public purpose" because it "did not conform with the result indicated by the court's mechanical application of other specified factors." *See* Solicitor General's Brief as Amicus Curiae at 10, in *Powerex Corp. v. Reliant Energy Services, Inc.*, No. 05-85 (Nov. 14, 2006). But, adopting a contrary stance, the Second Circuit found that the "strong national purpose" underlying KAMCO's creation "weighs

granting Certiorari in *both* cases, the Court will have the contrasting views from two prominent circuits, which have reached opposite conclusions by applying their own tests, on this issue of statutory construction.

As stated by the Solicitor General, this question is an "important, recurring, and sensitive one that warrants this Court's consideration."[3] Moreover, the Solicitor General correctly emphasized that a "critical divergence" exists in the way the circuits apply their tests concerning whether a foreign company is an "organ" of a foreign state.[4]

These two Petitions, when considered collectively, balance and better inform the issues through their strikingly different perspectives. This Court has traditionally granted certiorari in multiple cases where, as here, they present closely related issues.[5]

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heavily in favor of the conclusion that KAMCO is an organ of the Korean government" (App.32).

[3] *See* Solicitor General's Brief at 8, *Powerex* (No. 05-85).

[4] *Id.* at 9. Rule 10(a) provides that review by this Court may be granted where a "United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter."

[5] For example, in *United States v. Booker* and *United States v. Fanfan*, Nos. 04-104 and 04-105, 543 U.S. 220, 229 (2005), certiorari was recently granted from the First and Seventh Circuits where incompatible conclusions had been reached and the cases presented both sides of the same question. Hearing the two suits together allowed the Court to fully explore the matter and issue a more complete decision. *See also Commissioner of Internal Revenue v. Banks* and *Commissioner of Internal Revenue v. Banaitis*, Nos. 03-892 and 03-907, 543 U.S. 426 (2005)(certiorari granted to resolve conflict as to whether fees paid to attorneys in contingency cases constitute income); *Landgraf v. USI Film Products* and *Rivers v. Roadway*

Moreover, our Petition adds to the resolution of this question the crucial component of *private ownership*, left open by this Court's recent decision in *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), which is not at issue in *Powerex*. While the Queen of England indirectly owns *100% of Powerex*, in sharp contrast, there is a considerable measure of *direct, private ownership* and control of KAMCO. This, of course, is a leading dynamic in gauging whether a foreign company is truly an organ of a foreign government. Thus, this difference between our case and *Powerex* warrants review of both viewpoints.

Resolution of the Circuit Conflict is Essential to Lend Stability to an Expanding Area of Litigation

As foreign companies continue to pour into our country, the persistent confusion that exists in the circuits over such an important issue, as immunity from suit, is intolerable. What is even worse, Petitioner was never afforded his day in court concerning his $27 million fraud claim simply because he was located on the wrong side of the significant divide that has opened in the circuits over this chronic question.

Express, Inc., Nos. 92-757 and 92-938, 511 U.S. 244 (1994)(addressing conflict among the Fifth and Sixth Circuits as to whether the Civil Rights Act of 1991 applied retroactively); *Environmental Protection Agency v. California* and *Hancock v. Train*, Nos. 74-1435 and 74-220, 426 U.S. 200 (1976) (resolving question as to whether federal installations were required to adhere to state permit programs). This list is illustrative only.

We urge that this Court should determine if Petitioner has the right to litigate his claim in the same way as plaintiffs in the Ninth Circuit. And, local or parochial preferences of the Second and Ninth Circuits must yield to the superior force of a national rule that lends stability and certainty to an area of growing litigation. It is virtually conceded that the variations in the tests employed by the different circuits are becoming more and more pronounced. What is needed is for this Court to intervene and establish *one set of standards* to be uniformly applied throughout the nation.

In an effort to safeguard the immunity it acquired in this case, KAMCO erroneously claims that resolution of the existing conflict would not affect the outcome of this case because it "would be held to be an organ of a foreign state under any of the relevant circuit standards."[6] However, that is simply not true. Rather, if this action had been brought in the Ninth Circuit, KAMCO would not have acquired immunity under that circuit's different standards.[7] For example, the Ninth Circuit reasoned that since Powerex "was not run by government appointees, was not staffed with civil servants, was not wholly owned by the government, was not immune from suit, and did not exercise any

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[6] Brief in Opp. at 10-11.

[7] KAMCO acknowledges that the Third Circuit considers two additional factors that are not even part of the Second Circuit's test. *See* Brief in Opp. at 12. Thus, it is apparent that a conflict exists even between the Second and Third Circuits, as well as the Ninth Circuit.

regulatory power," it was not immune from suit under the FSIA. *California v. NRG Energy Inc.*, 391 F.3d 1011, 1026 (9th Cir. 2004), *cert. filed*, sub nom. *Powerex Corp. v. Reliant Energy Service, Inc.*, No. 05-85, 74 U.S.L.W. 3050 (July 15, 2005).

The same is true here. Government appointees do *not* run KAMCO. It is operated by its own private Management Committee, which includes an *elected* Director, as well as other individuals *drawn from the private sector* (A.315-17). Similarly, KAMCO is *not* staffed with civil servants. The district court recognized that there is no evidence that KAMCO must hire employees that are paid by the government (App.34-35).

Moreover, the Korean government does not wholly own KAMCO. Rather, *private banks own nearly one third of its shares*. *See* Brief in Opp. at ii. And, its officials are not immune from tort actions in Korea. Rather, they are "*considered to be officials of a private institution*" in lawsuits arising out of torts committed by KAMCO (A.367)(emphasis supplied). Therefore, the resolution of this matter was directly affected by the conflicts in law of the circuits.

Counsel for KAMCO also claims that the Solicitor General is wrong in his carefully reasoned *amicus* brief in *Powerex*, when he urges that this Court should resolve the conflict that is rampant across the circuits. *See* Brief in Opp. at 20-21. However, there is absolutely no way the decision in *Powerex* can be reconciled with the Second Circuit's order in this case.

Furthermore, KAMCO criticizes Petitioner for not citing *EIE Guam Corp. v. Long Term Credit Bank of Japan, Ltd.*, 322 F.3d 635 (9th Cir. 2003), rather than the Ninth Circuit's *subsequent* decision in *Powerex*. *See* Brief in Opp. at 2. But, there was no need to cite to distinguishable and earlier authority from that same circuit.[8]

"The Fact that the Court of Appeals' Order Under Challenge Here is Unpublished Carries No Weight in our Decision to Review the Case"

KAMCO also incorrectly states that the summary order in this case is "not an appropriate vehicle for repairing" any conflict among the circuits because it is unpublished.[9] However, this claim is meritless. This Court has explicitly stated, the "fact that the Court of Appeals' order under challenge ... is *unpublished carries no weight in our decision to review the case.* The Court of Appeals exceeded its jurisdiction regardless of nonpublication and regardless of any assumed lack of precedential effect of a ruling that is unpublished." *Commissioner of Internal Revenue v. McCoy*, 484 U.S. 3, 7 (1987) (emphasis supplied).[10]

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[8] And, contrary to KAMCO's contentions, the "existence of an intracircuit conflict" *is* sufficient to warrant review by this Court, especially where, as here, the conflict relates to a recurring and important issue and is accompanied by a widespread conflict among the circuits. *See* Robert L. Stern & Eugene Gressman, *et al.*, *Supreme Court Practice* § 4.6 (BNA Books 8th ed. 2002).

[9] Brief in Opp. at 21.

[10] Significantly, in *Massaro v. United States*, No. 01-1559, 538 U.S. 500 (2003), this Court granted certiorari and unanimously reversed a similarly unpublished order involving a conflict between the Second and Seventh Circuits. There, the Court chose an *unpublished*

Moreover, here, the *district court*'s lengthy decision, upon which the Second Circuit relied, *is* published and sets a dangerous precedent that warrants review. *See Murphy v. Korea Asset Management Corp.*, 421 F. Supp. 2d 627 (S.D.N.Y. 2005). (App. 3-46). Thus, this case presents an ideal platform to resolve the conflict between the Second and Ninth Circuits.

Additionally, KAMCO seeks to divert the Court from the serious legal issues presented by this case by suggesting that Petitioner has misstated facts about KAMCO. Brief in Opp. at 3. But, any *factual* disputes — which truly have no bearing on the legal questions at issue — derive from conflicting expert affidavits submitted by both sides.[11]

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order as the proper means to resolve a recurring issue relating to ineffective assistance of counsel claims.

[11] For example, KAMCO claims that its actions can subject the Korean government to liability under the Korean State Compensation Act ("KCSA"), which is purportedly the Korean equivalent of the U.S. Federal Tort Claims Act. Brief in Opp. at 4-5. However, the record establishes that KAMCO officials *are* "considered to be *employees of a private institution*" in lawsuits arising from torts committed by KAMCO (A.367) (emphasis supplied). Similarly, according to a well-respected Korean legal expert, the fact that KAMCO is subject to oversight by the Financial Supervisory Commission ("FSC") "indicates that KAMCO is *not* a government organ" because it is not included in the listing of "government agencies or organs" that are subject to such audit inspections (A.567) (emphasis supplied).

The Issues Presented by this Case are Compelling, Especially Since Korea Will Soon be Our Nation's Largest Free Trade Agreement Partner

Powerex, as an amicus curiae in this action, mistakenly suggests that "concerns of international comity do not support a grant of certiorari" in this case.[12] However, nothing is further from the truth. This case presents considerable and sensitive issues relating to international commerce. For example, the Office of the United States Trade Representative recently reported that the Republic of Korea is the "world's tenth largest economy." Moreover, it is this country's "seventh largest goods trading partner and our seventh largest export market." These startling statistics lend enormous force to our issues.

In fact, the Office reveals that Korea will be our *largest* Free Trade Agreement partner in 15 years.[13] As a consequence, it is plain that there is a desperate need to address issues relative to the evolving and important relationship between the United States and the Republic of Korea, as well as the inevitable effects on American companies that are harmed by Korean businesses.

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[12] *See* Powerex Corp. Brief as Amicus Curiae at 5, in *Jack Murphy v. Korea Asset Management Corp.*, No. 06-728 (Dec. 22, 2006).

[13] *See FTA: United States and Republic of Korea Economic and Strategic Benefits*, Office of the United States Trade Representative, Trade Facts, Feb. 2006, available at *http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2006/asset_upload_file582_8880.pdf.*

Finally, despite the recurring nature of this pressing issue, counsel for Powerex resists review in our case based upon a claim that the issue was waived. However, they are wrong. The district court's decision, which was endorsed by the Second Circuit, addressed, at length, what constitutes an organ or instrumentality under the Foreign Sovereign Immunities Act even though the court conceded that there is "no definitive test" to make this determination. *See* App.29.

Moreover, in the district court and on direct appeal, Petitioner was bound by the Second Circuit's decision in *Filler v. Hanvit Bank*, 378 F.3d 213 (2d Cir. 2004), *cert. denied*, 543 U.S. 1022 (2004), which established the Second Circuit's test for organ status under the FSIA. But, in our Petition for Rehearing *En Banc*, which was the first opportunity to challenge the propriety of the *Filler* test, we clearly disputed those factors.[14] Irrespective, this Court is fully authorized to review a question of this magnitude.[15]

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[14] *See* Petition for Rehearing at 11, in *Jack Murphy v. Korea Asset Management Corp.*, No. 05-5838-cv (2d. Cir. July 20, 2006) ("[i]n the wake of *Filler*, this is the very first case where this Court has been called upon to consider whether those factors should apply to a foreign company that is treated as a private entity under the law of its own country. We urge it is not necessary to address the *Filler* factors when the foreign state does *not* treat the defendant as an organ of its government").

[15] *See PGA Tour, Inc. v. Martin*, 532 U.S. 661, 678 n.27 (2001) (Court exercised its discretion to consider important question advanced in petition for certiorari and fully briefed by both sides); *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980) (interests of judicial administration served by addressing the merits of a recurring issue that was not presented in the district court or the court of appeals).

Conclusion

For all the foregoing reasons, as well as those raised in the original petition, Petitioner prays that a writ of certiorari issue to review the Second Circuit's opinion in this case.

December 28, 2006

Respectfully submitted,

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